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Public Employees for Environmental Responsibility

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November 15, 2000

VIA FIRST CLASS MAIL

Magalie Roman Salas, Secretary
Federal Communications Commission
Portals II
445 12th Street, SW
Suite TW-A325
Washington, D.C. 20554

Re: Proceeding No. RM-9913, *FCC Accountability and Responsibility for Environmental Transgressions, and Petition for Rulemaking Regarding the NEPA, NHPA, and Part 1, Subpart I of the Commission's Rules*

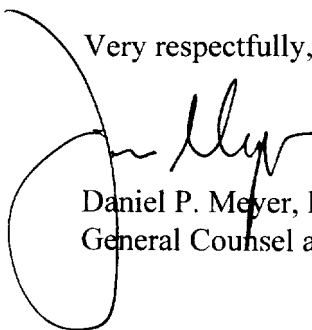
Dear Ms. Salas,

Enclosed for filing in the above referenced docket are five (5) duplicates of PEER's reply in the informal investigation of environmental violations at Mormon Peak, California.

Please file this documentation in Docket No. RM-9913 as further evidence justifying PEER's Petition. See Report No. 2426, Consumer Information Bureau, Reference Information Center, *Petition for Rulemaking - Filed* (RM No. 9913)(July 14, 2000).

The original has been mailed directly to the Office of the Chairman. Should you have any questions, please contact the undersigned at (202) 265.7337.

Very respectfully,


Daniel P. Meyer, Esq.
General Counsel and its Attorney

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Enclosure(s)





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November 15, 2000

The Honorable William E. Kennard
Chairman, Federal Communications Commission
and Mr. Thomas J. Sugrue, Bureau Chief
Wireless Telecommunications Bureau (WTB)
and Rose M. Crellin
Commercial Wireless Division
445 12th Street, S.W.
Washington, D.C. 20554

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BY FIRST CLASS POST

Re: *Request for Environmental Assessment and Enforcement Actions
i.c.o. Mormon Peak, CA (36 01 32 N.; 117 02 38 W.)*

Dear Chairman Kennard, Bureau Chief Sugrue and Rose M. Crellin:

Reply. Public Employees for Environmental Responsibility ("PEER") has reviewed the SBC Telecommunications, Inc. ("SBC") response to PEER's informal complaint regarding the communications facility at Mormon Peak, California. While PEER's complaint language was—and remains—strong, that language was chosen carefully in light of the continued lack of documentation regarding SBC's violations on Mormon Peak. Regarding SBC's response, PEER notes the following:

- SBC's own Attachment 9 confirms the presence of rare shrubbery and plant life on Mormon Peak, in addition to Native American house rings "just a few feet from the helicopter landing pad." See Attachment 9, SBC Response: Email, Dana York to Unknown Individual (Sept. 28, 2000)(0935 AM).
- SBC cites Attachment 9 as proof that "no significant environmental impact" will occur at Mormon Peak. Such an email is not the substantive analysis required to substantiate a finding of no significant impact ("FONSI"). Indeed, the York e-mail does EXACTLY the opposite. It verifies the existence of site-specific environmental resources requiring the filing of an Environmental Assessment. Compare 47 C.F.R. § 1.1307(4)(2000) with 47 C.F.R. § 1.1311(2000).



- SBC has not produced the Environmental Assessment required by the Commission's Rules when environmentally-sensitive resources are present. And yet, SBC has produced long-standing documentation of their knowledge regarding these environmental resources. Some of these documents are nineteen (19) *years* old. Given SBC's failure to comply with Part 47 while in possession of such documents, SBC may have the requisite intent necessary to charge it with a violation of the False Statements Act of 1934, 18 U.S.C. § 1001.
- SBC provides no documentation of inter-agency consultation between the FCC and USDI regarding either the Wilderness Act of 1964 or the California Desert Conservation Act of 1994. The EA required by the Commission's rules must address the impact of SBC facilities on the resources protected by these Acts. 47 C.F.R. § 1.1311 (a)(3),(4),(6)(2000).

PEER understands and empathizes with carrier SBC's frustration. The FCC's environmental rules are not designed to prompt compliance with the National Environmental Policy Act of 1969 ("NEPA"). One could best describe them as a "gentleman's game" ensuring little discussion of those contentious issues that impede the good conduct of commerce. To the extent SBC does not hold the intent required to charge an offender with a violation of the False Statements Act of 1934, it may well be that SBC was merely following rules which themselves violate the NEPA. In that case, it is the FCC itself which is in violation of the NEPA.

Open Issues. The following matters should be addressed before the FCC decides whether to order removal of the SBC communications facility from Mormon Peak. Mormon Peak lies within the "Death Valley National Park Boundary and Wilderness 15", so-designated by the U.S. Congress through the California Desert Conservation Act of 1994. "Wilderness" or "Wild Lands" are defined as "land in a state of nature, as distinguished from improved or cultivated land. Further, such lands are not used in conjunction with adjoining, improved lands. Indeed, when one permits improvement on "Wild Lands", such lands cease to be "wild". Conversely, lands that are deemed "wild" cannot be used in conjunction with improvements on adjoining lands. See Black's Law Dictionary 1771 (4th ed. 1951("Wild Lands"))[Emphasis supplied].

This common law tradition of demarking exploitable from unexploitable lands has worked its way into the Nation's environmental laws. Wilderness, as defined at federal law:

A wilderness, in contrast with those areas where man and his own works dominate the landscape, is hereby recognized as an area where the earth and its community of life are untrammelled by man, where man himself is a visitor who does not remain. An area of wilderness is further defined to mean in this chapter an area of underdeveloped Federal land retaining its primeval character and influence, without permanent improvements or human habitation, which is protected and managed so as to preserve its natural conditions and which (1) generally appears to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable; (2) has outstanding opportunities for solitude or a primitive and unconfined type of recreation; (3) has at least five thousand acres of land or is of sufficient size as to make practicable its preservation and use in an unimpaired condition; and (4) may also contain ecological, geological, or other features of scientific, educational, scenic, or historical value.

Section 1(c), The Wilderness Act of 1964, P.L. 88-97, 78 Stat. 890, *codified at* 16 U.S.C. § 1121, 1131-1136 [Emphasis supplied].

The National Environmental Policy Act of 1969, the Wilderness Act of 1964, and the Endangered Species Act of 1972 are all enabled by the Commission's environmental rules. 47 C.F.R. §§ 1.1301, 1.1307(a)(1),(3) (2000). When SBC d/b/a Pacific Bell Telephone Company applied to the FCC for permission to modify the existing facility at Mormon Peak, it was required to comply with the Commission's environmental rules. The carrier's Application appears to be deficient in the following areas:

- Upon filing its Application, SBC was required to subscribe and verify that its Application was supported by "good grounds" and that it was making "no misrepresentation or willful material omission" regarding the site at Mormon Peak. 47 C.F.R. §§ 1.17, 1.52 (2000).
- In preparing the same Application, SBC was required to review its communications facility siting plans to verify that "no minor or major modification of existing or authorized facilities or equipment" would be located in an officially-designated wilderness area or would affect . . . sites, buildings, structures or objects, significant in American history, architecture, archeology, engineering or culture, that are listed or eligible for listing, in the National Register of Historic Places. *Compare* 47 C.F.R. § 1.1306 (a) *with* 47 C.F.R. § 1.1307(a)(1),(4) (2000).

- If SBC found such environmental resources on the site at Mormon Peak, it was required to file an Environmental Assessment ("EA") with its Application. 47 C.F.R. §§ 1.1307(a), 1.1308, 1.1311 (2000). This EA was to be reviewed by Commission staff, who would then decide whether "further Commission environmental processing" was required under Part 47, Sections 1.1314, 1.1315 and 1.1317.
- Depending on the extent to which SBC satisfied the "good grounds" and "no misrepresentation or willful material omission" test, the FCC would then be able to certify that it—the Commission—was in compliance with NEPA. 40 C.F.R. § 1507.1 (2000). Note that it is not the place of SBC to assume the Commission's position with respect to determining a "finding of no significant impact" ("FONSI"). Nor is it the place of SBC to play running dog for the Commission in securing consultations with other Federal agencies. See 47 C.F.R. § 1.1308 (2000). These are all Commission functions that take place after an EA has been filed. 40 C.F.R. §§ 1501.5, 1501.6 (2000).

Evidence of Failure. By its own hand SBC has submitted a collection of odd documents, none of which appear to have been submitted with its Application to modify the existing facilities. Given the dates on these documents, we are lead to believe that SBC has disgorged to the Commission the universe of known environmental data it has collected on Mormon Peak. Of specific interest in reviewing the integrity of SBC's Application is the material presented regarding the classification of the site as "Wilderness" by the U.S. Congress and the presence of archaeological ruins on the peak. These resources triggered the FCC's environmental rules; regulations SBC has ignored. The FCC should also be attentive to statements regarding rare or sensitive flora on the site, plants that may require consultation with other federal Agencies under Part 47, Section 1.1308.

The following random documents submitted by SBC—none of which qualifies as an "EA" as that term is defined by Part 47, Section 1.1311 of the *Code of Federal Regulations*—provide evidence of SBC's intent and failure in this matter:

- **SBC Attachment 2:** WESTEC Services, Inc., *Wildlife Assessment for Mormon Peak Solar Powered Microwave Repeater Site* (August 1981)(Paid for by Pacific Telephone and Telegraph).

This material is almost two (2) decades old. The status of many North American species has changed since the first year of Ronald Reagan's presidency. Note, too, that WESTEC limited its findings due to "season, brevity of the survey, and the small size of the proposed site." *Id.* at 1. Arriving on a helicopter during the

western summer heat, one is not likely to find much wildlife on an exposed mountain top. Those fauna not already sheltered from the season would have sought shelter from the noise and high winds created by the machinery. Even more important is WESTEC's 1981 conclusion that the helicopter visits would not impact local wildlife: this is contrary to the National Park Service's current regulations. *Compare Id.* at 3 (Section 4.0) with 43 C.F.R. §§ 8560.1-2(c), 8560.4-2 (2000).

- **SBC Attachment 3:** Letter Report, Mary DeDecker to Ray Weamer, Pacific Telephone Company (Aug. 19, 1981)(noting, "My bill is enclosed".)

Another document from the early 1980s, this report is at odds with Attachment 9, *infra*. Both reports note the presence of "Bird's Beak" flora on the site, but the authors disagree on which sub species is present. As the proper classification of flora is necessary to determine whether an Endangered Species is present, this is an issue to be resolved through an EA executed pursuant to Part 47, Section 1.1307 of the *Code of Federal Regulations*.

- **SBC Attachment 4:** Letter Report, James D. Swenson, Senior Staff Archeologist, University of California, Riverside to Mark Lawrence, Area Manager, Ridgecrest Resource Area, USDI/Bureau of Land Management (Aug. 27, 1981).

In the most probative evidence of all, SBC provides direct testimony by an archaeologist that "two rock rings (probably house circles) were discovered approximately 17 meters east and northeast of the bench mark at 8270 feet on National Park Service property. Due to the close proximity of the rock rings to the project area it is feared that inadvertent damage could occur to these fragile features during construction." *Id.* [Emphasis supplied]. Even though Dr. Swenson advised "no significant impact" in this Letter Report, his testimony provides evidence to the contrary. Indeed, had SBC or Pacific Bell provided this information to the Commission in either 1981 or 1999, this disclosure would have triggered an EA and, possibly, further Commission environmental processing.

- **SBC Attachment 5:** United States Department of Interior, Right-of-Way Granted, *Decision* (May 26, 1982).

PEER notes for the record that Pacific Telephone and Telegraph took the right-of-way across Mormon Peak subject to actual knowledge that the site may one day be designated "Wilderness". *Id.* See also, Letter, Lucia Kuizon, Assistant District Manager, Land and Mineral Resources, Bureau of Land Management, United States Department of Interior to Unknown Executive, Pacific Bell (July 20, 1995)(Providing formal notice that Mormon Peak was now within Death Valley

National Park, and recently designated by the California Desert Conservation Act of 1994)[Included as Attachment 1 to Pacific Bell's *Request to Modify Existing Right of Way*, CA-8961 (Undated)].

- o SBC Attachment 9: Email, Dana York to Unknown Individual (Sept. 28, 2000)(0935 AM).

PEER notes for the record that Attachment 9 is SBC's sole cite for the proposition that it has complied with the Commission's environmental rules. Attachment 9 was not submitted with SBC's Application to the FCC, nor is it an EA. See 47 C.F.R § 1.1308, 1.1311 (2000).

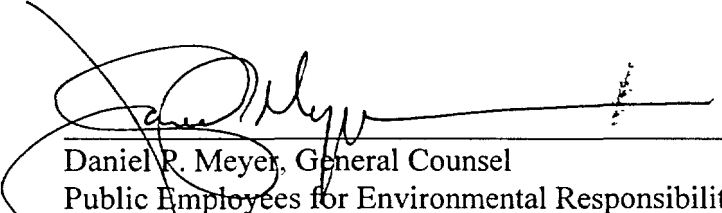
SBC's response to PEER's informal complaint is firm evidence of failure by both the Commission and SBC. The Commission's environmental rules—when followed—do not form an analytical framework sufficient for Commission staff to make environmental decisions. Accordingly, industry is dismissive of the Commission's statements in support of the environment. Corporations simply deem early morning, "first coffee" emails to be EAs. As such, sensitive environmental resources have been exposed to continuous degradation.

Unless SBC can produce a date-stamped Application with an EA analyzing the applicability of the Wilderness Act of 1964 to environmental compliance at this site and the applicability of the National Historic Preservation Act of 1996 to continued operations in the proximity of the rock/house rings, SBC is in violation of the Commission's rules. SBC not only had constructive knowledge of the environmentally-sensitive resources, it had *actual* knowledge thereof. Actual knowledge, in this case, combined with a material omission regarding both the Wilderness status and the presence of rock rings, speaks to the willful intent of a corporation addressing its duties under the environmental laws. Whether individual executives understood the magnitude of their actions is immaterial. The question is whether the Applicant sought to avoid the chore of filing an EA, and omitted material information in order to accomplish that goal.

Conclusion. Given the environmentally-sensitive resources atop Mormon Peak, PEER respectfully requests the Commission order SBC to immediately conduct and file an EA on its activities at the Mormon Peak site. PEER further requests that an inquest be convened to review the SBC Applications regarding Mormon Peak to determine whether executives of that corporation are in violation of the Commission's rules regarding subscription and verification of truthful statements. If the Commission discovers a willful mind to obstruct the law, PEER requests the matter of SBC's violation be referred to the federal District Attorney for the District of Columbia for prosecution under the False Statement Act of 1934, 18 U.S.C. § 1001.

All fines, damages and remedies owed by SBC to the United States Government should be committed to the National Park Service or an appropriate conservancy for the reclamation of Mormon Peak as "wilderness".

Cordially,



Daniel P. Meyer, General Counsel
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("PEER")

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PEER Environmental Law Clerks, 2000

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(for filing in FCC Dkt. RM-9913)

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